**GOH ENG WAH**

**v.**

**YAP PHOOI YIN & ORS.**

PRIVY COUNCIL
LORD SCARMAN
LORD ELWYN-JONES
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN
[APPEAL NO. 6 OF 1983]
25 FEBRUARY 1985

***CONTRACT:*** *Rent review clause - Interpretation - Whether rent payable to be based on value of site only or of site and buildings thereon.*

A lease dated 16 August 1957 concerning a piece of land with buildings erected on it had clauses stipulating rental reviews for certain periods of the tenancy. After 20 years, the landlord and tenant disagreed on the rental whether the rent should be assessed with reference to the land only or to the land and buildings thereon. The trial Judge decided that it should refer to the land only. The Federal Court reversed the judgment of the trial Judge, hence this appeal.

**Held:**

**[1]** By well established principles rent would issue out of the land including any buildings from time to time on the land and would *prima facie* be referable to the value of the land plus buildings.

**[2]** In the absence of any express instructions in the lease, then whatever the parties may in their heart of hearts have intended, the lease on its true construction does not authorise any deviation from the usual rule and it follows that the rent must be fixed by reference to the land and the buildings thereon.

*[Appeal dismissed with costs.]*

**JUDGMENT**

**Lord Templeman:**

This appeal concerns an unusual rent review clause in an unusually worded lease. The question is whether the rent payable in respect of the demised premises should be based on the letting value of the site only or on the letting value of the site and the buildings thereon.

The lease was dated 16 August 1957 and recited that the landlord was the registered proprietor of "lot No. 573, s. 62, in the town of Kuala Lumpur, in the District of Kuala Lumpur, in area 0 acres 2 roods 27.9 poles (hereinafter referred to as the 'said land')". The recital which was no doubt adopted from the terms of the Certificate of Title did not refer to any building in the definition of "the said land". The lease then demised "the said land together with the buildings erected thereon and known as Star Theatre ... for a term of thirty years from 1 July 1957 at a monthly rental as stated hereinafter, ... subject to the stipulations, modifications, terms and conditions hereinafter contained". Clause 1 of the lease provided for "the rent of the said land". By well established principles that rent would issue out of

the land including any buildings from time to time on the land and would *prima facie* be referable to the value of the land plus buildings. By Clauses 1(i), (ii) and (iii) the rent was fixed at RM400 per month for the first ten years, RM500 per month for the next five years, RM700 per month for the next five years, and then:

> (iv) From the beginning of the 21st year to the end of the 25th year such sum exceeding RM700 as shall be agreed to by the parties hereto or failing agreement as shall be fixed by an arbitrator;
>
> (v) From the beginning of the 26th year to the end of the 30th year such sum exceeding the rent fixed for the preceding period of five years as shall be agreed to by the parties hereto or failing agreement as shall be fixed by an arbitrator.

At the end of twenty years the parties were unable to agree the rent and the dispute was accordingly referred to an arbitrator who stated a case to the Court asking: -

> Whether on an interpretation of Clause 1(iv) of the said Memorandum of Lease the correct base for assessment of the fair rental payable therein should be the value of the land only or whether it should relate to the land and buildings erected thereon.

In the High Court of Malaya at Kuala Lumpur Harun Hashim J held that the rent "must be assessed with reference to the land only". The Federal Court of Malaysia (Raja Azlan Shah, Ag. L.P. Malaysia, Lee Hun Hoe CJ (Borneo) and Mohd. Azmi FJ) allowed the landlord's appeal and held that the rent should relate to the land together with the buildings erected thereon. The tenants appeal with leave of the Federal Court to His Majesty the Yang di-Pertuan Agong.

Down to the end of Clause 1 of the lease there are grounds for diverging from the general rule that the rent of the land must be valued as at the end of the twentieth year of the term with the buildings then erected. On behalf of the tenants Mr. Wood has powerfully and persuasively argued that reading the lease as a whole, there is a sustained distinction between the land on the one hand and the buildings on the other hand and that it can be inferred from the lease that the rent of the land was intended to ignore the buildings.

The tenants' covenants included in Clause 3(b) a convenant to keep in repair "the cinema at present known as Star Theatre and erected by the Lessee at his own cost and expense on the said land". The parties could not have intended, submits Mr. Wood, to make the tenants pay a rent for the cinema which the tenants had themselves erected. It is conceded that the rent for the first twenty years must have been a low rent beginning at 1% and not exceeding 2% of the sum of RM320,000 for which the tenants covenanted in Clause 3(e) to insure the cinema. The lease did not reveal whether the tenants were entitled at law to a lease at a low rent because they had erected the building by virtue of some prior agreement to that effect. Subsequent provisions of the lease maintained a distinction between the land and the buildings although not always a logical distinction. For example there was a covenant not to assign sub-let or part with possession of the cinema or any part thereof whereas logically that covenant ought to refer to or include the land. Mr. Wood pointed out that there are no references to the land which also include the cinema.

Finally Mr. Wood relied on Clause 4(b) of the lease whereby the tenants were granted an option at the expiration of the term of thirty years for "a lease of the said area and the said cinema theatre and all other buildings with their fixtures and fittings for a further term of five years containing the like covenants ... with the exception of the covenant to renew and 'the conditions as to rental' which shall be fixed by mutual agreement of the parties herein or

failing agreement which shall be fixed by an arbitrator but which in either case shall exceed the amount of rental payable for the last five years of the term hereby created". Mr. Wood faintly argued that there was a distinction between the rent for the thirty year term which was to be the rent of the said land and the rent of any term granted pursuant to the option to renew which was to be of "the said area and the said cinema theatre and all other buildings ... ". Ultimately however Mr. Wood acknowledged the difficulty of arguing that the rent to be fixed pursuant to Clause 1(iv) and (v) of the lease was to be a rent based on the land ignoring the buildings whereas the rent to be similarly fixed by the arbitrator pursuant to Clause 4(b) was to be fixed by reference to the land plus the buildings.

Their Lordships do not consider that the terms of the landlord's and tenants' covenants shed any light on the problem now to be solved save that they show that the tenants had paid for the cinema and that the draftsman of the lease was well aware of that fact. In those circumstances it would not have been surprising if the lease had provided for a low rent. Indeed the lease does so provide for the first twenty years because Mr. Brodie who appeared for the landlord acknowledged that bearing in mind the insurance covenant to insure for RM320,000 the rents of RM400, RM500 and RM700 fixed by Clause 1(i), (ii) and (iii) were low rents. The lease provides for the rent to be fixed after twenty years by an arbitrator and does not tell him on what basis he is to make that valuation. In the normal course of events he would base his value on the land plus buildings. Mr. Wood's strongest point is that, having fixed a rent for the first twenty years, the lease expressly provides that the arbitrator is not to fix a rent for the next five years at RM700 or less that being the low rent last paid. If, submits Mr. Wood, the intention had been to change from a low rent basis to a high rent basis there would have been no need to specify that the new rent must exceed RM700.

While appreciating the force of this argument, their Lordships agree with Mr. Brodie that if the parties intended that the rent fixed by an arbitrator should ignore the buildings on the land, they should and would have given express instructions to the arbitrator for that purpose. In the absence of any such express instructions in the lease, then whatever the parties may in their heart of hearts have intended, the lease on its true construction does not authorise any deviation from the usual rule and it follows that the rent must be fixed by reference to the land and the buildings thereon. In short Mr. Wood's submissions involve an amount of speculation which cannot be justified. The lease must be construed in accordance with the intentions of the parties but only in so far as those intentions were expressed in the lease. There is nothing in the lease which enables the arbitrator to carry out the difficult task of assuming that the rent he is to fix must be a rent which ignores the facts and compels the arbitrator to make the hypothetical assumption that no cinema was ever built.

In the result their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed with costs.

Also found at [1985] 1 CLJ 408